Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1328

In The

Supreme Court of the United States

October Term, 1984

KAREN FRANCES ULANE, *Petitioner,*

vs.

EASTERN AIR LINES, INC., *Respondent.*

On Petition for a Writ of Certiorari to The Seventh Circuit Court of Appeals

PETITIONER'S REPLY BRIEF AND REQUEST FOR SUMMARY REVERSAL BASED ON *ANDERSON v. CITY OF BESSEMER*

LOWELL E. SACHNOFF
DEAN A. DICKIE*
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000
Attorneys for Petitioner

Of Counsel:
FAY CLAYTON
BRIAN D. ROCHE
SACHNOFF WEAVER & RUBENSTEIN, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

March 25, 1985 *Counsel of Record

CHAS. P. YOUNG COMPANY

7PP

TABLE OF CONTENTS

	PAGE
ANDERSON v. BESSEMER CITY REQUIRES SUMMARY REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS ON COUNT I	1
CONCLUSION	4

TABLE OF AUTHORITIES

Anderson v. Bessemer City, 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985)	*passim*
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	2
Fed. R. Civ. P. 52(a)	2, 4

No. 84-1328

In The

Supreme Court of the United States

October Term, 1984

KAREN FRANCES ULANE, *Petitioner,*

vs.

EASTERN AIR LINES, INC., *Respondent.*

ANDERSON v. BESSEMER CITY REQUIRES SUMMARY REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS ON COUNT I

On March 19, 1985, this Court issued its decision in *Anderson v. Bessemer City*, No. 83-1623, reaffirming the rule that a district court's finding of intentional discrimination in an action brought under Title VII of the Civil Rights Act of 1964 is a finding of fact that may not be set aside unless clearly erroneous. The holding and teaching in *Anderson* on the limits of appellate review of the findings of fact by a district court underscore the necessity for granting the pending petition for a writ of certiorari and mandate that the judgment of the Court of Appeals on Count I be summarily reversed.

The district court found that Ms. Ulane was discriminated against as a female (Count I). The Seventh Circuit reversed the judgment on Count I because it believed the subsidiary findings did not support the ultimate finding that Ms. Ulane was discriminated against as a female. *Anderson* confirms petitioner's position, as fully stated in her Petition, that the Seventh Circuit abused its appellate authority in reversing

the finding of fact that Ms. Ulane was discriminated against as a female.[1]

In reversing the district court's finding of discrimination against Ms. Ulane as a female, the Seventh Circuit violated this Court's command in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As this Court emphasized just last week in *Anderson*, "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception." Slip op. at 10. The Seventh Circuit has violated this rule by reversing the factual finding of discrimination, without even paying lip-service to Rule 52(a) of the Federal Rules of Civil Procedure, and without any analysis of the evidence and the district court's subsidiary findings which support its ultimate finding that the petitioner was discriminated against as a female.

In *Anderson*, this Court explained the limits of an appellate court's power to review the district court's findings of fact:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Slip. op. at 8. The Seventh Circuit, like the Fourth Circuit in *Anderson*, reversed the district court's finding of discrimination because it took a different view of the evidence. Paying even less heed to Rule 52(a) than did the Fourth Circuit in *Anderson*, the Seventh Circuit in the pending case failed to

[1] The Seventh Circuit also reversed the judgment on Count II, which was based upon discrimination against Ms. Ulane as a transsexual. Because *Anderson* requires reversal of Count I, this Court need not reach the issues of statutory interpretation raised by Count II.

provide any analysis of what evidence supported its conclusions, or what findings of the district court were illogical or implausible. As far as one can tell from the Seventh Circuit's one-page discussion, it simply believed that its own interpretation of the evidence was the better one. Under *Anderson*, unless clearly erroneous, the district court's interpretation must control.

The Seventh Circuit's opinion sidesteps the strict requirements of the clearly erroneous standard by contending that the district court made no factual findings to support the conclusion that Eastern discriminated against Ms. Ulane because of her sex.[2] As described fully in the Petition, the

[2] Eastern Air Line's Brief makes the same error. However, in addition to ignoring the clearly erroneous standard, Eastern attempts to retry its case in this Court, just as it did in the Seventh Circuit. Indeed, Eastern's "Statement of the Case" contains a host of false assertions which were expressly rejected as unworthy of belief by the district court and which are unworthy even of rebuttal here. Suffice it to say that in the 17 days of trial testimony, the district court heard abundant evidence concerning all the "facts" which Eastern's brief recites. The district court found that "[t]he safety concerns that Eastern purports to have been cognizant of appear to be readily dispelled when confronted with the facts." *See* Appendix C to Petition, at 17. The court found each of Eastern's purported reasons for the discharge to be pretextual (Appendix C, at 32). Indeed, after weighing extensive medical and psychiatric testimony on the subject of transsexuality in general and Ms. Ulane in particular, the district court concluded that, notwithstanding her transsexuality, Ms. Ulane was better qualified to fly than Eastern's average pilot (Appendix C, at 14).

As this Court reminded the Fourth Circuit in *Anderson*, "the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road"'." Slip op. at 9-10. Eastern presented its evidence at the "main event" in the district court, and its evidence was not persuasive. Its attempt to retry its case in either the Seventh Circuit or in this Court should not be sanctioned.

district court's findings of fact are replete with examples of disparate treatment between this female pilot and male pilots. Rather than analyze these findings under the careful and deferential standard required by Federal Rule of Civil Procedure 52(a) and *Anderson*, the Seventh Circuit pretends the findings do not exist. It substitutes its interpretation for that of the district court and, without any discussion of specific evidence or the appropriate standard of review, concludes that "[i]t is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual. . . ." (Appendix A, at 12). The district court, after 17 days of live testimony, reached a different conclusion. *Anderson* mandates that the district court's interpretation prevail.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the judgment of the Court of Appeals on Count I.

Respectfully submitted,

LOWELL E. SACHNOFF
DEAN A. DICKIE*
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000
Attorneys for Petitioner

Of Counsel:
FAY CLAYTON
BRIAN D. ROCHE
SACHNOFF WEAVER & RUBENSTEIN, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

March 25, 1985

*Counsel of Record